

DIVISION II

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION

CA 05-1195

APRIL 26, 2006

CLOUDY'S TRUCKING, LLC,  
PROTEGRITY SERVICE, INC. and  
ARKANSAS GUARANTY FUND  
APPELLANTS

APPEAL FROM THE WORKERS'  
COMPENSATION COMMISSION  
[NO. F008725]

V.

ROBERT L. CLEARY

APPELLEE

AFFIRMED

**JOHN B. ROBBINS, Judge**

Appellee Robert Cleary suffered an admittedly compensable injury to his left knee while working for appellee Cloudy's Trucking on June 29, 2000. After a lengthy series of medical treatments, Mr. Cleary was assigned a fifty-three percent impairment rating to the lower left extremity in March 2001. The appellant compensated Mr. Cleary for the impairment rating, and also paid for medical expenses and temporary total disability benefits. However, Cloudy's Trucking controverted Mr. Cleary's subsequent claim for permanent and total disability benefits. After a hearing, the Workers' Compensation Commission found that Mr. Cleary established that he was permanently and totally disabled and awarded the requested benefits in a decision dated September 13, 2005. Cloudy's Trucking now appeals.

For reversal of the Commission's award of permanent and total disability benefits, Cloudy's Trucking raises two issues. First, it argues that the Commission erred in failing to find that the claim was statutorily barred because a claimant with a scheduled injury is ineligible to receive benefits beyond those provided in the schedule. In this regard, Cloudy's Trucking takes issue with the Commission's reliance on an opinion by the court of appeals,

*McDonald v. Batesville Poultry Equip.* \_\_ Ark. App. \_\_, \_\_ S.W.3d \_\_ (April 13, 2005), which was decided after the hearing and after the ALJ had made her decision in this case.<sup>1</sup> Cloudy's Trucking further argues that, even if Mr. Cleary's claim is not statutorily barred, the Commission's decision is not supported by substantial evidence. We affirm.

When reviewing a decision of the Workers' Compensation Commission, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to findings of the Commission and affirm that decision if it is supported by substantial evidence. *Heptinstall v. Asplundh Tree Expert Co.*, 84 Ark. App. 215, 137 S.W.3d 421 (2003). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* The issue is not whether we might have reached a different conclusion or whether the evidence would have supported a contrary finding; even if the preponderance of the evidence might indicate a contrary result, if reasonable minds could reach the Commission's conclusion, we must affirm its decision. *Id.* The Commission has the duty of weighing the medical evidence as it does any other evidence. *Roberson v. Waste Mgmt.*, 58 Ark. App. 11, 944 S.W.2d 858 (1997).

Mr. Cleary was the only witness to testify at the hearing. He stated that he is fifty-two years old and has a tenth-grade education and a GED. Mr. Cleary has worked as a truck driver since the age of twenty-one. He was working in that capacity on June 29, 2000, when he attempted to step down from his trailer after securing a load. According to Mr. Cleary, he twisted to the ground with all of his weight on his left leg, causing multiple fractures. He suffered severe injuries and was transported to a hospital by ambulance.

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<sup>1</sup>The ALJ awarded permanent and total disability benefits on July 29, 2004, and the Commission affirmed that decision. However, on appeal we review only the decision of the Commission. See *Freeman v. Con-Agra Frozen Foods*, 344 Ark. 296, 40 S.W.3d 760 (2001).

The accident occurred in Ohio, where Mr. Cleary received medical care that included surgery. After spending a total of a month in a hospital and rehabilitation center, Mr. Cleary was flown from Ohio to his home state of North Carolina, where he came under the care of Dr. Matthew Zettl. Mr. Cleary developed a highly contagious staph infection that threatened his limb as well as his life, and he spent six weeks in isolation undergoing treatment for the infection. Due to the extent of damage to his left leg Mr. Cleary was not expected to walk again, but he subsequently learned to walk with the use of a cane and sometimes a brace.

Mr. Cleary testified that he has developed painful calluses on the bottoms of his feet as a result of the way he now has to walk. He further stated that, as a result of his compensable injury, his back and his left hip, leg, and ankle are in constant pain. Mr. Cleary stated that he has difficulty sitting for extended periods of time due to swelling and a lack of circulation in his leg, and maintained that his condition is gradually getting worse.

Mr. Cleary worked with vocational case manager Dawn Ellis, who was hired by appellant's insurance carrier, beginning in February 2001. Due to his physical limitations Mr. Cleary cannot return to his previous work as a truck driver, and Ms. Ellis developed other employment leads for Mr. Cleary to pursue. Mr. Cleary registered with the Employment Security Division and attempted to find work, but stated that he could not be placed for employment due to the restrictions and limitations imposed by his doctor. His focus then changed to possibly retraining, and in April 2001 his case was transferred to vocational case manager Ellen Lee-Dudley.

Ms. Lee-Dudley assisted Mr. Cleary in his pursuit of computer training to become a web-page designer. Mr. Cleary took a placement test at Carteret Community College, and as the result of a low score he was required to take at least one semester of remedial English

before enrolling in computer classes. In a report filed in May 2001, Ms. Lee-Dudley stated that Mr. Cleary had elected to pursue an education in computers at Carteret Community College, which would entail seventy-two weeks of training in web-page design after completion of a remedial English course. Ms. Lee-Dudley closed Mr. Cleary's case and terminated vocational-management services.

Despite authorization to pursue computer training, Mr. Cleary declined to enter the program after making the determination that a school setting was not appropriate for him. He explained that he had difficulty sitting for the placement exam due to circulation problems in his leg, and stated that a class setting would require him to get up and down and disturb others in the class. Mr. Cleary stated that he can only sit for thirty to forty-five minutes before his leg starts hurting and throbbing, and that the classes are an hour long.

Mr. Cleary met with another vocational specialist, Rosie Pasour, in February 2004. During her involvement in the case Ms. Pasour spoke with Dr. Zettl, and she reported that he told her that he did not think Mr. Cleary would be able to get a job because it would have to be completely sedentary. Dr. Zettl further informed Ms. Pasour that there are bad days when Mr. Cleary could not get out at all. Ms. Pasour inquired as to whether a functional capacity evaluation would be feasible, and Dr. Zettl indicated that such an evaluation would be too dangerous. Thus, no evaluation was performed. In her report Ms. Pasour stated, "It appears that return to work will be difficult for Mr. Cleary given his physical restrictions and his level of education," and she closed the file. In a follow-up letter to Dr. Zettl, Ms. Pasour asked for clarification regarding Mr. Cleary's ability to return to work, and Dr. Zettl responded that Mr. Cleary is not capable of full-time employment, but that he is capable of sedentary work that does not require lifting for five hours a day, five days a week.

In a February 2004 report, Dr. Zettl predicted further deterioration of Mr. Cleary's leg, stating, "over time, I am certain that it will worsen and consideration will have to be given to reconstructive procedure[s], although any major surgery of his knee would be fraught with considerable risk." Dr. James Craigie was another of Mr. Cleary's treating physicians, and he authored the following report regarding Mr. Cleary's disability in March 2002:

Robert Cleary suffered a disabling accident at work. He was transferred to my care in order to reconstruct a complicated limb threatening injury. At the time he was initially seen by me I felt Mr. Cleary had a very significant chance of losing his leg. At our first encounter I advised him of the risks and we embarked on a long course of reconstruction that lasted over 12 months. Following the initial three major limb salvage surgeries Mr. Cleary required aggressive medical treatment for drug resistant bacterial infections. He had become significantly malnourished during his illness and this required aggressive nutritional resuscitation and certainly prolonged his disability. Because of his initial injury Mr. Cleary suffered failure of multiple organ systems which are associated with a high mortality rate. Indeed prior to being transferred to my care Mr. Cleary had already suffered two life threatening complications of his accident. The complexity of Mr. Cleary's injury is far beyond a typical lower extremity trauma case that requires recovery from a simple fracture. Mr. Cleary's recovery required life saving as well as limb saving measures. During his recovery he was unable to participate in any substantial work. The energy required to recover from his injuries would have made it impossible for Mr. Cleary to participate in any substantial work for over 12 months. He has been required to elevate his leg at all times when not ambulating and his ability to walk for more than 10-15 minutes at a time would have prohibited him from even commuting to any type of work. In fact during this time I would not have cleared Mr. Cleary medically to return to any substantial work as it would have compromised his recovery as well as the integrity of his opposite leg. Mr. Cleary has also been required to take medication that would have impaired his ability to drive and concentrate. At no time during his course has he demonstrated any lack of desire to return to a productive occupation. He has been one of the most motivated and optimistic patients I have treated.

Mr. Cleary has been a heroic patient and his hard work and tenacity to recover from his life threatening unfortunate injury should be commended. He has been very motivated throughout his incapacitation and should not be penalized additionally for his misfortune. In spite of his tremendous efforts to return to work the fact remains he suffered a disabling accident that has certainly prohibited him from returning to substantial work of any kind and his disability has certainly been continuous for more than 12 months in a row.

Appellant's first argument on appeal is that the Commission erred in failing to conclude that Mr. Cleary's claim for permanent and total disability benefits was barred by the relevant statutes. Appellant notes that Mr. Cleary sustained a scheduled injury, and cites Ark. Code Ann. § 11-9-521(g) (Repl. 2002), which provides:

Any employee suffering a scheduled injury shall not be entitled to permanent partial disability benefits in excess of the percentage of permanent physical impairment set forth above except as otherwise provided in § 11-9-519(b).

Arkansas Code Annotated section 11-9-519(b) (Repl. 2002) provides:

In the absence of clear and convincing proof to the contrary, the loss of both hands, both arms, both legs, both eyes, or of any two (2) thereof shall constitute permanent total disability.

Because Mr. Cleary did not suffer the loss of two body parts included in section 11-9-519(b), Cloudy's Trucking contends that there is no exception to the limiting language of section 11-9-521(g), and that Mr. Cleary was not entitled to any permanent disability benefits in excess of his scheduled benefits.

In reaching its decision that Mr. Cleary's claim was not statutorily barred, the Commission relied on *McDonald v. Batesville Poultry Equip.*, *supra*, a case where we reversed the Commission's decision that a scheduled-injury claimant is barred by section 11-9-521(g) from receiving permanent total disability benefits unless section 11-9-519(b) applies. The Commission in the present case quoted the following excerpt from our opinion:

Here, the Commission ignored the clear language of Ark. Code Ann. § 11-9-521(g) that a scheduled-injury claimant "shall not be entitled to *permanent partial disability benefits* in excess of the percentage of physical impairment set forth above except as otherwise provided in § 11-9-519(b)" (emphasis ours). In finding that a scheduled-injury claimant is prohibited from entitlement to *permanent total disability benefits* in excess of the percentage of his physical impairment and that such a claim must meet the multiple-loss requirements, the Commission impermissibly expanded the statutory prohibition of a claim for permanent partial disability benefits except in a case of multiple losses. Thus, we hold that the Commission erred in finding that Ark. Code Ann. § 11-9-521(g) prohibits "benefits in excess of the schedule," and it erred in determining that McDonald, after sustaining a scheduled compensable injury,

was statutorily prohibited from bringing his claim for permanent total disability under subsections 11-9-521(g) and 11-9-519(b).

However, Cloudy's Trucking argues that the Commission's reliance on this case was improper because the dates of the injury, the hearing, and the ALJ's decision all predated our April 13, 2005, opinion. Appellant thus urges that the controlling statutory interpretation is the Commission's interpretation that was established prior to the *McDonald* mandate, where the Commission found a statutory bar to such claims.

We do not agree with appellant's contention that our precedent in *McDonald v. Batesville Poultry Equip., supra*, does not apply to this case. Cloudy's Trucking correctly asserts that our mandate in that case came subsequent to Mr. Cleary's injury, the hearing, and the ALJ's opinion. However, the same was true for the parties in *McDonald*, and we applied our interpretation of the statutes to the controversy in that case. This is not a situation where the applicable legislation changed, as the relevant statutes were in effect at the time of Mr. Cleary's compensable injury. *McDonald* was the first published case interpreting the interplay of sections 11-9-521(g) and 11-9-519(b), and the Commission properly relied on it in deciding the present case.

Consistent with our opinion in *McDonald v. Batesville Poultry Equip., supra*, we affirm the Commission's decision that the applications of sections 11-9-521(g) and 11-9-519(b) do not bar Mr. Cleary's claim for permanent and total disability benefits. Prior to the enactment of Act 796 of 1993, a scheduled-injury claimant was eligible for permanent total disability benefits if he met his burden of proof on the issue. In *Moser v. Arkansas Lime Co.*, 40 Ark. App. 113, 113-C, 846 S.W.2d 188, 190 (1992) (supplemental opinion on denial of rehearing), we stated:

[T]he award for a scheduled injury generally is limited to the benefits provided for that particular scheduled injury. *Rash v. Goodyear Tire and Rubber Co.*, 18 Ark. App.

248, 715 S.W.2d 449 (1986). However, as long ago as 1966, the Arkansas Supreme Court held that the benefits for scheduled injuries are not limited to the schedule when the scheduled injury results in permanent total disability. *McNeely v. Clem Mill & Gin Co.*, 241 Ark. 498, 409 S.W.2d 502 (1966); *see also Johnson Construction Co. v. Noble*, 257 Ark. 957, 521 S.W.2d 63 (1975). Given that, in scheduled injury cases, the nature of the injury is fixed, the finding of permanent and total disability under such circumstances necessarily hinges on factors, such as those described in *Glass v. Edens*, 233 Ark. 786, 346 S.W.2d 685 (1961), which bear on the claimant's age, education, experience, and other matters affecting wage loss.

Although Act 796 added section 11-9-521(g), that section's application is limited to a scheduled claimant's entitlement to permanent *partial* disability benefits in excess of those provided by the schedule. This amendment to workers' compensation law provides no prohibition to a scheduled claimant's entitlement to permanent and *total* disability benefits. Thus, even where a claimant has a scheduled injury, he may still be entitled to permanent and total disability benefits where he proves he is unable, because of his compensable injury, to earn any meaningful wages in the same or other employment as set forth in Ark. Code Ann. § 11-9-519(e)(1) (Repl. 2002).

Cloudy's Trucking next argues that, even in the absence of a statutory bar, Mr. Cleary has nonetheless failed to prove that he is permanently and totally disabled. Appellant asserts that it offered vocational retraining in the form of computer courses, but that Mr. Cleary declined to pursue the opportunity for personal reasons. In *Sapp v. Phelps Trucking, Inc.*, 64 Ark. App. 221, 984 S.W.2d 817 (1998), we held that in assessing wage-loss disability the Commission may consider the claimant's lack of motivation to return to work. Cloudy's Trucking submits that even though Mr. Cleary has trouble sitting for extended periods of time, he should have nonetheless attempted to speak with his professors and seek appropriate accommodations. Cloudy's Trucking further notes that Dr. Zetl gave the opinion that Mr. Cleary could perform sedentary work five hours per day, five days a week. Based on the



evidence presented, appellant contends that substantial evidence does not support the Commission's finding that Mr. Cleary is unable to earn any meaningful wages.

We hold that there was substantial evidence to support the Commission's finding that Mr. Cleary is permanently and totally disabled. The Commission is charged with determining disability based upon a consideration of medical evidence and other matters affecting wage loss, such as the claimant's age, education and work experience. *Emerson Elec. v. Gaston*, 75 Ark. App. 232, 58 S.W.3d 848 (2001). At the time of the hearing Mr. Cleary was fifty-two years old with a tenth-grade education, and his employment was exclusively as a truck driver since the age of twenty-one. He is no longer able to drive a truck, and his left knee injury has left him unable to engage in any meaningful physical activities.

While the vocational specialists attempted to place Mr. Cleary in courses for retraining beginning in the fall of 2001, Dr. Craigie reported in March 2002 that despite Mr. Cleary's "tremendous efforts to return to work the fact remains he suffered a disabling accident that has certainly prohibited him from returning to substantial work of any kind[.]" While Dr. Zetl did give the opinion that Mr. Cleary is capable of returning to part-time sedentary work, he also was certain that Mr. Cleary's knee condition would worsen and potentially require additional risky procedures. Vocational specialist Rosie Pasour documented that returning to work will be difficult given Mr. Cleary's physical restrictions and lack of education. Significantly, Mr. Cleary testified that his decision to decline retraining was not due to a lack of motivation but rather pain and throbbing in his leg that compromised his ability to sit for the required classes. Giving due deference to the Commission's credibility determinations and weight to be given the medical evidence, we affirm its decision that Mr. Cleary met his burden of proving entitlement to permanent and total disability benefits.

Affirmed.

GLOVER, J., agrees.

HART, J., concurs.